(17)

No. 84-4

In The
Supreme Court of the United States
October Term, 1984

WILLIAMSON COUNTY
REGIONAL PLANNING COMMISSION, ET AL.,
Petitioners,

v.

HAMILTON BANK OF JOHNSON CITY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

ROBERT L. ESTES
M. MILTON SWEENEY*
STEWART, ESTES & DONNELL
14th Floor
Third National Bank Building
Nashville, Tennessee 37219
(615) 244-6538
Counsel for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

23pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 84-4

In The
Supreme Court of the United States
October Term, 1984

WILLIAMSON COUNTY
REGIONAL PLANNING COMMISSION, ET AL.,
Petitioners,

v.

HAMILTON BANK OF JOHNSON CITY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

ARGUMENT

I. Respondent Fails To Establish A Taking Under The Just Compensation Clause.

Hamilton, in its Brief on the Merits at page 11, states that August of 1979 was the first time the Planning Commission chose to apply changes in the regulations to the Temple Hills Development since it first approved a preliminary plat in 1973. Hamilton, as it has throughout the case, attempted to ignore the facts, and its refusal to even

address the questions presented in all of the briefs filed on behalf of the Planning Commission, tends to explain the ignorance of such facts by the Court of Appeals for the Sixth Circuit.

It is without question that the Planning Commission *never* gave approval to all of the areas in Temple Hills Development for which approval was sought, either in 1980 by a prior developer or in 1981 by Hamilton. The plats submitted in those years were the first plats ever submitted for consideration or approval by the Planning Commission which showed development in areas that had been specifically excluded under all prior approvals.

Additionally, 18.5 acres of the property which was included in the original preliminary plat approval had been removed from that development as a result of condemnation action by the state. Hamilton consistently ignored that fact even though the condemnation of the area required a completely new design for road layout and reduced the gross acreage of the development. Hamilton had always, at least until trial, taken the position that the condemnation and loss of the 18.5 acres should be totally ignored for the purpose of determining whether it has established any rights in the development of the property, under the original calculation.

In August of 1979, the preliminary plat was reapproved under the then current subdivision regulations and zoning ordinances. Most of the subdivision regulation amendments enacted from 1973 through 1979 provided only for upgrading of the type of road construction. Amendments to the zoning ordinance in 1977 required a 10% reduction of the land area to take into account the area used for roads (R. 77).

Hamilton also ignores the fact that the preliminary plat on which it relies was not reapproved every year in accordance with the subdivision regulations. The preliminary approval of June 19, 1975 was the last until April 20, 1978 (Pl. Ex. 9701, J.A. 423). There should be no question that any amendments made to the subdivision regulations prior to April 20, 1978 legally, logically and equitably apply to the development. It is only with regard to that area covered by the preliminary plat which never received final approval that there should be any question as to which regulations apply. The Planning Commission has never suggested that the areas which had received final plat approval and which were properly recorded could in any way be affected by any changes in the subdivision or zoning ordinances.

The most basic question to be determined by this Court is whether there are any rights established by Hamilton which have been so adversely affected by the action of the Planning Commission as to constitute a taking under the Just Compensation Clause of the Fifth Amendment. If the Bank has failed to establish such rights, then there can be no taking. The Bank continually assumes that it has certain rights, and merely addresses the question of compensation for taking of those rights.

To answer this question, this Court must make two threshold determinations which are: (1) whether the Respondent has alleged a Constitutional violation and (2) whether the action taken by the Planning Commission was

sufficiently final to constitute a "taking" at all. A Constitutional violation under the Just Compensation Clause is not alleged simply by showing that a state (or one of its subdivisions) has "taken" property. There is no question that it is lawful for the government to take property in order to carry out a public purpose. The Constitution is violated *only* if the state takes property "without just compensation". *Hurley v. Kincade,* 285 U.S. 95, 104 (1932); and. *Ruckelshaus v. Monsanto Company,* 104 S. Ct. 2862 (1984).

The Courts below should not have retained respondent's suit as alleging a violation of the Just Compensation Clause because the Respondent, in its Complaint, alleged only that the Petitioner's action resulted in a taking of property in violation of the 14th Amendment (J.A. 16). The Respondent did not allege that the Planning Commission, as a subdivision of the State of Tennessee, failed to make compensation available for any purported taking. The Respondent attempts to sidestep this issue by ignoring the holding in *Davis v. Metropolitan Government of Nashville,* 620 S.W. 2d 532 (Tenn. App. 1981), which clearly indicates that an aggrieved party may recover in condemnation for unreasonable restriction on the use of property due to enactment of zoning laws. *Id.* at 534.

The Respondent has a duty to allege and prove that the state did not make compensation available. The Respondent dismisses the holding in *Davis* as only dicta (Resp. Br. 38 n 16), and certainly fails to carry the burden of proof. Not being content to simply ignore the obvious law in the State of Tennessee as set forth in the *Davis* case, the Respondent tenuously argues that the Tennessee Inverse Condemnation Statute (Tenn. Code Ann. §29-16-

123) is not an exclusive remedy because it contains the word "may". If compensation is available under the T.C.A. §29-16-123 for any taking that might have occurred, there is no Constitutional violation at all, and no basis for Respondent's suit in Federal Court under 42 U.S.C. § 1983 to remedy an alleged Constitutional violation. There being no completed Constitutional violation because there is a state remedy available, i.e. an inverse condemnation action, there should be no federal countenance of this action. For the same reason, Respondent's reliance on *Home Telephone and Telegraph Company v. City of Los Angeles,* 227 U.S. 278 (1913) in answering this argument is misplaced. That case concerns whether a person must seek judicial review in the State Court to correct action by a state administrative body that was allegedly in violation of substantive due process. The Court held that, in that setting, the Constitutional violation was complete when the administrative agent took the action, even if it was unauthorized by state law. *Accord Monroe v. Pope,* 365 U.S. 167 (1961). By contrast, there is no completed Constitutional violation at all when an administrative agency "takes" property if compensation is available for that taking in a judicial form.

The Respondent continually confuses the elements of a due process claim with those of a just compensation claim. The Respondent errs in attempting (Resp. Br. 39-40) to distinguish *Parratt v. Taylor,* 451 U.S. 527 (1981), and *Hudson v. Palmer,* 104 S. Ct. 3194 (1984), which state the proposition in the context of a due process claim as opposed to a just compensation claim. Respondent argues that in *Parratt* and *Hudson* the random and unauthorized negligent or intentional acts of agents could

not be controlled by the state in advance, so the post deprivation process was adequate to satisfy the due process clause, while here, the "taking" was pursuant to an established state procedure. *See Logan v. Zimmerman Brush Company,* 455 U.S. 422 (1982). What Respondent overlooks is that under the due process clause there must be notice and opportunity for hearing before the deprivation; in *Parratt* and *Hudson* the Court recognized exceptions to that rule and held that post deprivation process was adequate. Under the Just Compensation Clause, by contrast, the Court has not established a general rule requiring that the government pay compensation (or provide an opportunity for hearing on the question of compensation) prior to the taking. The Court has consistently held, most recently in *Ruckelshaus v. Monsanto, supra,* that the government may take property first and pay compensation later. Moreover, and perhaps most importantly, Respondent's due process challenge to the Commission's action was rejected in the District Court, so it cannot now argue that the Commission's actions did not satisfy the standards in *Parratt* and *Hudson.*

Aside from the fact that the Respondent's allegations do not make out a Constitutional violation under the Just Compensaion Clause, practical considerations support this conclusion as well. If Respondent's view is correct, any inverse condemnation action, i.e., any suit for compensation brought after a taking is alleged to occur, may be brought in Federal Court even if the state has also furnished a fully adequate inverse condemnation procedure. This Court has refused, and should continue to refuse as it did in *Parratt,* to "make of the 14th amendment a font of tort law to be superimposed upon whatever systems

may already be administered by the States". 451 U.S. at 544.

The Respondent cites (Resp. Br. 37) four Supreme Court zoning cases (*Young v. American Mini Theaters, Inc., Warth v. Seldin, Village of Belle Terre v. Boraas,* and *Village of Euclid v. Ambler Realty Company*) in arguing that this Court should not be concerned about Federal Court involvement in this area. However, all of those cases cited by the Respondent involved a substantive challenge to zoning practices, based upon substantive due process claims, not upon claims for compensation in adverse condemnation. Those cases do not suggest that the Federal District Court should be converted into Claims Court to recover compensation from the states.

As has been indicated in the initial Brief on the Merits filed on behalf of the Petitioners (Pet. Br. 3-4), there existed in 1973 a two step procedure for approval of subdivisions. In 1973 an initial sketch plat was submitted to the Planning Commission for general preliminary approval. Subsequent to such approval a developer could submit final plats, section by section if he chose, containing significant engineering data to be approved by the Planning Commission and to be put on record. Once these final plats had been recorded the individual was free to develop the property and sell lots from the subdivision. Current procedure is substantially the same, although the initial sketch plat is now referred to as a preliminary sketch plat.

Hamilton also relies upon what it refers to as the "Grandfather Clause", as contained in the 1981 amendments to the subdivision regulations (Resp. Br. 10). Respondent claims that this clause provided that the De-

veloper of an ongoing project had the right to continue the project under the regulations that were in effect at the time of original approval. Actually the "Grandfather Clause" contained in the 1981 subdivision regulations at Article 2.2 provides as follows:

> *2.2 Savings Provision*
>
> These regulations shall not alter, modify, void, vacate or nullify any action now pending or any rights obtained by any person, firm or corporation by lawful action of the County prior to the adoption of these regulations.

Even assuming that the Savings Provision had some application to the Temple Hills Development, its only application could be those areas of the development which had received final plat approval, the final being the only plat that grants any rights to a developer. This would be pursuant to the Tennessee State Law and to the subdivision and zoning ordinances in effect in Williamson County. As this Court held in *Board of Regents v. Roth*, 408 U.S. 564 (1972), property interests "are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits and that support claims of entitlement to those benefits". *Id.* at 577. Assuming argumentatively that the Grandfather Clause would apply to the Temple Hills Development, then it is necessary to review the subdivision regulations that were in effect in 1973 when the first initial sketch plat was approved. The subdivision regulations then in effect at Section B.7 provided:

> The approval of the preliminary sketch plat shall lapse unless the final plat based thereon is submitted within one year from the date of such approval unless an extension of time is applied for and granted by the Planning Commission.

That provision of the subdivision regulations was amended on August 16, 1979 when the Planning Commission, in order to clarify the procedures for reapproval adopted an amendment to Section B.7 by adding the following sentence thereto:

> Renewal shall be granted if the preliminary plat meets regulations and situation at time of renewal.

It is important to note that this amendment was made to the subdivision regulations prior to the time the preliminary plat for the Temple Hills Development was approved on August 16, 1979 (P. Ex. 1073 J.A. 279). This is a fact of which the Bank had knowledge prior to the time it acquired the property.

Assuming that the 1981 subdivision regulations and the Grandfather Clause require that regulations in effect at the time the preliminary plat for Temple Hills was reapproved apply, then the regulations in effect in 1979 at which time the preliminary plat was reapproved would apply. If, however, the 1981 regulations and the Savings Clause require that the 1973 regulations be applied to the Temple Hills Development, those regulations should be applied only to the areas which had been approved in 1973. Those areas that were marked as excluded from the development on the preliminary plat, which had been reapproved several times through 1979, have never been approved. Both Hamilton and the Sixth Circuit erroneously ignored the fact that several areas within the development were specifically excluded under all prior approvals. There can be no valid legal theory under which

the Bank can claim rights to develop areas of the Temple Hills Development that were specifically excluded from all prior approvals. There can be no interpretation of the following language other than its clear, plain meaning:

> "THIS PARCEL NOT TO BE DEVELOPED UNTIL APPROVED BY THE PLANNING COMMISSION" and
>
> "PARCELS WITH NOTE 'THIS PARCEL NOT TO BE DEVELOPED UNTIL APPROVED BY THE PLANNING COMMISSION' NOT A PART OF THIS PLAT AND NOT INCLUDED IN GROSS AREA."

The language that was contained on the preliminary plat approved in 1973 and on the plat as reapproved from time to time through 1979 was plain and unequivocal. There can be no question as to its meaning.

In addition, the plats also contain the language:

> Actual dwelling units presented this initial sketch plan 469 (Pl. Ex. 9700, J.A. 422).

The only approval ever received by any developer in 1973 would have been for 469 dwelling units to be constructed on areas not specifically excluded from that plat. It must remain clear, however, that only final platted and approved sections which are recorded in accordance with Tennessee law vest any rights in the developer.

As has been previously stated, only in 1980 did a *new* proposed plat show that the remaining property which had been specifically excluded from all prior preliminary approvals was intended for development. This was the first time the Planning Commission ever saw the effect of the condemnation of 18.5 acres (referred to as Natchez Trace take) on the development. A road originally proposed on the preliminary plats that has been previously approved to loop through the area was now cut, which resulted in excessively long cul-de-sacs. One cul-de-sac was in excess of 5,000 feet, the other in excess of 3,000 feet. (Pl. Ex. 9702 J.A. 425). This new development, first presented to the Planning Commission in 1980, was in absolute violation of both the 1973 regulations as well as those later in effect. The 1973 regulations provided for cul-de-sacs of only 400 feet, (Def. Ex. 110), whereas the 1981 subdivision regulations allow cul-de-sacs of 800 feet. (Pet. Ex. 112). Both regulations provided for variances to the cul-de-sacs lengths in certain instances. However neither the Bank nor its predecessor, both represented by the former County Planner, Mr. Tom Ragsdale, ever sought a variance as to the cul-de-sac problem first presented to the Planning Commission on the preliminary plat in 1980 or 1981 (R. 1181, 1184, 1204-1205).

II. This Action Is Not Ripe For Adjudication Because Of Respondent's Failure To Pursue Its Administrative Remedies.

The concept of taking usually connotes a formal acquisition of the property by a governmental entity, or at least a divesting by that state entity of a property interest belonging to a private person or entity. Such a "taking" occurs only when, in the regulatory setting, the state agency has taken formal and *final* action. The Petitioner's preliminary or interlocutory rejection of a particular proposal for an extension of the development, which occurred in June 1981, did not constitute a formal and final determination to restrain any further development on the property in question. Again, the Respondent uses the term "taking" in this instance to connote an abuse of

governmental power, the sort of conduct addressed by the Due Process Clause and not the Just Compensation Clause.

The Respondent states that it did all it could to seek approval of its plan for development. In fact, the opposite is true. The Respondent insisted that the Petitioner approve at least the 736 dwelling units that were shown to have been originally approved on the first preliminary plat. Only after it was pointed out to the Respondent that the 18.5 acres had been taken from the development did they concede at all on that number.

While the Respondent, through its employee, Tom Ragsdale, admits that the prior developer was told in January of 1980 to revise his plat (R. 92), this was never done. Although Mr. Ragsdale testified that he told the County Planner that he would work with him to improve the plat (R. 110, J.A. 84), this never occurred either.

Mr. Killebrew, a representative of the Respondent, testified that he did not believe even after the time suit had been filed that he had sufficient engineering data to determine if there were any problems with slope on the property (R. 842). Further, Mr. Killebrew admits that although the cul-de-sac problem was known to the Respondent, no plan to correct the problem had ever been submitted to the Planning Commission (R. 846). Killebrew testified that the Respondent thought they still had enough room to loop the roads around the golf course, but because of a problem caused by survey error which became known to them in August of 1982, they could not do so (R. 855). It should also be noted that this information was known to the Bank prior to the time it acquired the property at foreclosure.

Although there were negotiations between the Planning Commission and the Respondent and prior developer in an attempt to work out some of the problems, the Respondent and the prior developer flatly refused to submit a plat which even attempted to correct any of the problems (R. 1181). The Respondent also would have been required to obtain waivers of the zoning ordinances but never attempted to do so (R. 1184, 1204 J.A. 217). (See also testimony of Ann Peterson R. 1702 and 1706 J.A. 222; also testimony of Robert Medaugh R. 1816).

III. The Jury Verdict Cannot Be Intepreted, As A Matter Of Law That There Had Been A "Taking" Under The Just Compensation Clause.

Hamilton suggests that the jury verdict in this case supports the finding that there had been a taking (Resp. Br. 24-27). Careful examination of the jury verdict, and perhaps a more careful examination of the Sixth Circuit majority opinion, reveals that the jury verdict does not substantiate the finding that there had been a taking compensable under the Fifth Amendment. The jury was given interrogatories by the Court on which to make certain responses. The Petitioners objected to these form interrogatories because they were not sufficiently complete for the jury to make a proper finding as to the factual issues before the Court. In particular, they were not specific enough to determine whether or not there had been a deprivation of economic use in order to constitute a taking. Particularly, the Court instructed the jury to determine:

> 1. Are the Defendants estopped from requiring the Plaintiff to comply with the present zoning regulations as opposed to the 1973 regulations?

To this interrogatory the jury responded—yes.

The jury's response, as interpreted by the District Court, was simply that Hamilton would have been entitled to proceed to have approved a preliminary plat *which conformed* with the 1973 regulations. The finding as to the estoppel issue certainly should not be interpreted to mean that either Hamilton or any prior developer had in 1980 or 1981 any vested rights to develop the property other than in conformity with the 1973 regulations. The real problem in this case is that Hamilton could not develop the remaining land in accordance with the 1973 zoning ordinances, or at least it did not want to attempt to, because it never submitted a plan which conformed to those subdivision regulations and zoning ordinances. (R. 1173, J.A. 216).

To interpret the jury's finding on the estoppel question in any other fashion would be to find that Hamilton had obtained vested rights to develop the remaining land and totally disregard the facts that much of the land sought to be developed in 1980 and 1981 was specifically excluded from approval in all prior years. It would also require the ludicrous finding that Hamilton had a vested right to develop the property without regard to the fact that 18.5 acres of the original development was no longer a part of the development, and would totally ignore the effect of that removal of 18.5 acres upon the development. The development could not proceed under the preliminary plat that was approved in 1973 because of the loss of the 18.5 acres. Simply stated, until the Bank submitted a preliminary plat covering the new area and reflecting the changes resulting from the loss of 18.5 acres and the survey error, and conforming with the 1973 regulations,

there could be no taking. The Bank having failed to make that application cannot claim a taking. As the District Court judge finally ruled, until there has been a submission to the Planning Commission, it being required to apply the 1973 standards, or until it violates the Court's ultimate injunction, there could not be found to be a taking. The District Court realized this in its final ruling granting the Petitioner's Motion for Judgment Notwithstanding the Verdict, and set forth in the Judgment of Permanent Injunction language requiring the Petitioners to apply only the applicable regulations in effect in 1973. The Court, realizing the fact that there had never been a plat submitted for approval which could meet the 1973 standards, did as a matter of law set aside the jury's finding that there had been a compensable taking because there had yet to be established a taking. The District Court in its memorandum states:

> However, legitimate technical questions of whether Plaintiff meets the requirements of the 1973 regulations are capable of resolution through applicable state and local procedures of appeal. See e.g. Tennessee Code Annotated § 13-7-08. This Court should not attempt to assume the function of a "Court of Zoning Appeals" to resolve every question of technical application of the 1973 regulations. See *Kent Island Joint Venture v. Smith,* 452 F. Supp. 455, 464 (D.Md. 1979) (J.A. 42).

It is therefore obvious that the District Court contemplated further proceedings by Hamilton before the Planning Commission and the submission of a plan to the Planning Commission that comported with the 1973 regulations.

The fallacy of the Bank's position, as well as the majority opinion of the Sixth Circuit Court of Appeals, is an

assumption that the mere imposition of the amended regulations constituted a taking. It is clear that approval of the plat as submitted was not possible because it contained numerous violations of the 1973 regulations. Until a plan was submitted to the \Planning Commission which reflected the new changes to the property, which at a minimum complied with the 1973 regulations, and that plan turned down by the Planning Commission there could be no taking. There had never been any approval of some of the area sought to be developed by Hamilton in 1981. It is totally illogical to say that Hamilton had vested rights taken when it could never establish any rights in the land specifically excluded from approval, and it is equally illogical for Hamilton to argue that a preliminary plat established rights when the situation had been drastically changed as a result of the Natchez Trace take. To hold otherwise would allow a developer of land to challenge any and all regulations if the otherwise valid application of those regulations would in any way reduce the economic viability of use, even where that reduction is primarily the result of the physical characteristics of the property. Justice Brennon, in the dissent in the *San Diego Gas and Electric Company v. City of San Diego,* 450 U.S. 621 (1981) case, required the establishment of a *regulatory taking* before "the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the 'taking' and ending on the date the government entity chooses to rescind or otherwise amend the regulations." *Id.,* at 653. It is required that the Bank must, at a minimum, submit a preliminary plat that conforms with the 1973 regulations before any application by the Planning Commission of any regulations can effect

"regulatory taking." There can be no taking in this case considering the facts, and therefore there is no need to consider whether the economic viability has been affected, and the investment backed expectations of the Bank interfered with.

The District Court's decision, although perhaps not as lengthy or articulate as it might have been, does reach the correct holding. Until the Planning Commission receives a Plat that is in substantial compliance with the 1973 regulations, it cannot be found that there has been any regulatory taking or interference with economically viable use of the property.

The Bank in its brief wrongfully misleads this Court by stating the following:

> "The evidence is clear and convincing that at least under the pre 1979 Commission's interpretation of the regulations, Hamilton complied fully."

Such conclusion tends to imply that there were vested rights in *all* land sought to be developed, and is intellectually dishonest. *Never* had a plat been submitted to the Planning Commission pre or post 1979 which approved for development of all the areas that originally contained the note: "THIS PARCEL NOT TO BE DEVELOPED UNTIL APPROVED BY THE PLANNING COMMISSION."

The Bank's assertion that it had vested rights to develop the property is totally unfounded. Failure to establish such rights precludes the finding that there is a taking. If the Bank had submitted a plat substantially in compliance with the 1973 regulations, and if the Planning Commission had turned it down by applying other regulations,

then perhaps there would a judiciable issue before this Court. The Bank has not resubmitted a plat similar to that plat submitted in 1973. In fact, it submitted a totally new plat for consideration and approval. The new plat submitted by a prior developer in 1980 was the first to show the effect of the Natchez Trace take. The submissions up to 1979 were patently wrong. When in 1980 a plat was submitted that did reflect the real situation, i.e., the loss of 18.5 acres, the Planning Commission correctly refused to approve that plan. This disapproval could have been based as easily upon the 1973 regulations as upon the 1980 or 1981 regulations. The Bank insists that the Planning Commission, and this Court, ignore reality and grant it the right to proceed when in fact it never had the right to proceed.

Respondent's brief suggests that the majority of the Sixth Circuit declared that the jury determined that the Bank had acquired a vested right to develop Temple Hills (Resp. Br. 21). The Bank, as well as the majority of the Sixth Circuit, find implications in the jury's response to the District Court's interrogatories which should not be implied. The reference by the majority of the Court of Appeals is to the estoppel issue and not the taking issue. The Court states that "The jury, must, therefore, have found that Hamilton had acquired a right to develop Temple Hills according to the plat that had been submitted." (J.A. 53). The Court of Appeals refers to "approved plans for the development". It should be noted that the only plans for the development that were ever submitted in 1981 contained areas that had been specifically excluded under *all* prior preliminary approvals. The Court of Appeals majority totally ignores the fact that the Bank was

seeking approval for areas never approved by the Planning Commission. The Court of Appeals must have failed to review the plats as submitted in 1980 and 1981, because it is obvious that they were totally different from those submitted in 1973, and covered areas previously specifically excluded. The jury's own finding was that the Bank could proceed to develop under the 1973 regulations. There was no finding that the Respondent had vested rights to proceed under the plats submitted in 1980 or 1981. As has been stated before, there could be no finding of a taking which is subject to compensation until a plat had been submitted by the Bank which comports with at least the 1973 regulations. Once such a plat had been submitted, if the Planning Commission refused to approve it, then the issue may be ripe for judicial action. This was never done prior to filing suit.

For the same reasons stated above, the majority of the Court of Appeals also fails in its economic analysis of the degree of interference with investment backed expectations. Again the investment backed expectations analysis should only be made once the Bank has established some reasonable basis upon which to base its investment backed expectations. Certainly it cannot be found that the Bank could have investment backed expectations as to property which had been specifically excluded under all preliminary plat approvals of the development. Nor should the Bank be found to have any investment backed expectations as to the 18.5 acres which had been removed from the development. This, however, is the position of the Respondent. These facts, taken together with the fact that the Bank had knowledge that in 1979 the preliminary plat had been reapproved subject to all of the regulations

then in effect, plus the fact that in 1980 a plat similar to the one submitted by it in 1981 had been rejected, certainly indicate that there could be no proper finding that the Bank had any valid investment backed expectations at the time it purchased the property.

———o———

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and the District Court's Judgment Notwithstanding the Verdict should be reinstated.

Respectfully submitted,

ROBERT L. ESTES
M. MILTON SWEENEY*
STEWART, ESTES & DONNELL
14th Floor
Third National Bank Building
Nashville, Tennessee 37219
(615) 244-6538

Counsel for Petitioners

*Counsel of Record